Northern Limit Line: Demarcation Issues in the Yellow Sea

MORITA Keiko

Introduction

Since the early 1970s, North Korean naval vessels have intermittently infiltrated the South Korean waters over the Northern Limit Line (NLL). It is still remembered vividly that on June 29, 2002, North Korean patrol boats entered the NLL near Yeonpyeong Island, triggering gunfights and killing six South Korean crews. On another occasion on February 20, 2003, North Korean MiG 19 jet fighters violated South Korean airspace near the island over the NLL. North Korea has thus committed NLL crossing on and off.¹

The NLL refers to the sea boundary running between the so-called the five West Sea Islands (Baekryeong Island, Daecheong Island, Sopcheong Island, Yeonpyeong Island and Woo Island) and the North Korean coast. In 1953, the line separating North and South Korea was established by the United Nations Command for the purpose of preventing armed conflicts between South and North Korea on the Yellow Sea² after the signing of the Korean War Armistice.³ The United Nations Command and South Korean have been of the opinion that the NLL is an effective means of separating South and North Korean military forces and thus reducing military tension.⁴ North Korea, however, began to reject the NLL in the 1970s. In 1977 and 1999, it unilaterally set up its own sea boundary, inviting confrontation among them.

No compromise has been likely to be reached regarding a sea boundary on the Yellow Sea. The waters concerned have been left unattended for about 50 years since the Armistice Agreement was concluded, particularly 30 years since conflicts emerged. Several views, including the one by the parties concerned, have been presented on the legal validity of the NLL. Since a formal agreement on the boundaries has yet to be reached, the legal validity will not be discussed here. This paper is designed to explore the background as to why the

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³ The West Sea and the Yellow Sea represent the same waters, and except for special proper names, such as the five West Sea Islands, the Yellow Sea is used.
⁴ 31st Republic of Korea-United States Security Consultative Meeting, Joint Communiqué, November 23, 1999, esp. paragraph 7. Documents provided by the UNC.
issue remains unresolved, not as to whether the NLL is valid or not. While many other long-lasting disputes over sea boundaries between states exist, North and South Korean cases have the following unique feature. Greater demands than in time of peace are expected for the establishment of military boundaries, be they temporary, in view of the purpose of the armistice to separate both forces. Strictly speaking, however, such boundaries have not existed for the past 50 years. Will this not prevent the Armistice from producing practical effects? Suppose that the issue remains as it is for decades, causing no problem, and that it is enough to deal with violations of North Korea on a case-by-case basis. The problem over the Yellow Sea boundaries would be a trifle matter for the parties concerned.

The Armistice Agreement still remains legal regime between North and South Korea. But the agreement is silent on the sea boundary on the Yellow Sea, leaving the issue unresolved. South Korea insists on the validity of the NLL, while North Korea has denied it and proposed a totally different boundary. Within South Korea alone, legal grounds for the boundary vary. Some stick to the interpretation of the Armistice Agreement, while others cite other international rules (for example, the United Nations Convention on the Law of the Sea), unaffected by the interpretation of the Armistice Agreement alone. Even in quoting the law of the sea, changes are seen in rules to be cited and ways of application. Discussions are thus in chaos.

With the above-mentioned problems in mind, this paper reconfirms the importance of the sea boundary problem in securing the cease-fire on the Korean Peninsula. Chapter I outlines what kind of status has been given to the NLL in connection with the Armistice Agreement and what kind of legal issues have brought about disputes between North and South Koreas. Chapter II explains chronologically how the parties concerned have made efforts to solve the disputes since the 1970s when conflicts over the sea boundary came to the fore within the framework of the Armistice, and studies whether the framework has worked effectively as a forum for the parties concerned, and if not, what kind of measures they tried to use. What matters together with the nature of a forum for negotiations is legal basis for respective arguments. In recent years, a shift has occurred to claims based on the law of the sea, giving new perspectives to conflicts over the NLL. In the meantime, North Korea has also attempted to base its arguments on the law of the sea. For example, it has proposed "demarcation of a boundary based on the principle of equidistant median line." Though the two Koreas are far from formally establishing sea boundaries, some of

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5 The problem over the demarcation line of a sea boundary on the Yellow Sea is treated as a domestic problem at least among the parties concerned. Although this paper relies on the Defense Ministry for reference materials, it is the Unification Ministry that takes charge of the NLL as a South Korean national organization. The arguments of the Defense Ministry alone, therefore, cannot be regarded as a unified official view. Nevertheless, opinions of the Unification Ministry are hardly available, and the Ministry presents fewer views on the NLL than the Defense Ministry.
the ongoing arguments on both sides will possibly be reflected in future negotiations on sea boundaries and will be cited in this paper. Another question may arise — how the special situation where the cease-fire has lasted long will be considered within the framework of the law of the sea.

In the process of studying these issues, I would like to clarify why the problem over a sea boundary, which should essentially play a role as a cease-fire line, has remained unsolved for such a long time. I will also examine the situation on the Korean Peninsula reflected in the disputes over the sea boundaries, together with the arguments on both sides, to find out practical reasons for the disputes and perceive the realities of the problem. These are the ultimate objects of this paper.

I Status of NLL in Armistice Agreement

Involved in the sea boundary on the Yellow Sea are the coastal nations of North and South Koreas, and the United Nations Command, which led the Korean War, and concluded the Armistice Agreement. The NLL was also established by the United Nations Command. First, it is necessary to look back on the situation on the Korean Peninsula leading to the establishment of the NLL.

A. History of NLL

As is widely known, Korea was liberated from Japanese colonial rule that had lasted for 35 years after Japan's defeat in World War II, but was soon occupied by the U. S. and Russian forces. Korea was separated mechanically under the 38th parallel. Soviet troops occupied the area north of the 38th parallel and U. S. troops the area south of the 38th parallel. Initially, the Allies intended to put Korea under UN trusteeship for five years, not to give a status of an independent state. After consultations with the provisional Korean democratic government, the U. S., the Soviet Union, the United Kingdom promised to work out "measures ... for helping and assisting (trusteeship) the political, economic and social progress of the Korean people, the development of democratic selfgovernment and the establishment — of the national independence of Korea" (US-Britain-Russia Trilateral

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Moscow Agreement, III. 3). As a preparatory body, the US-Soviet Joint commission was set up, but went into indefinite recess soon after its launch in March 1946. Though it resumed its sessions, it had only fruitless negotiations. In a bid to break the deadlock, the U. S. proposed to the UN that nationwide elections be held and the U. S. and Soviet troops withdraw from Korea after the Korean government was established. The independence of Korea was to be discussed under the UN.

In 1948, elections were held in the south. As a result, the Republic of Korea was established in the south, and the UN adopted the resolution formally recognizing the Seoul government as a lawful government. The Article 4 of the Constitution of the Republic of Korea enforced the same year stipulates that "the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands," insisting that the whole peninsula belongs to South Korea.

In June 1950, North Korean troops invaded South Korea, beginning the Korean War. The United Nations Command founded under the UN Security Council Resolution took the initiative during the war and in negotiations on a cease-fire. In 1953, an Armistice Agreement was signed by the United Nations Command, the Commander of the Chinese People's Volunteers, and the Supreme Commander of the Korean Peoples Army. Under the Article 1 of the Agreement, the Military Demarcation Line (MDL) was drawn, designating two-kilometer demilitarized zones on both sides. With this, the portion of the peninsula from the beginning point of the MDL on the Yellow Sea (that is, a boundary between Hwanghae-do and Gyeonggi-do province) to the 38th parallel was assigned to North Korea. The five West Sea Islands were put under the jurisdiction of the United Nations Command as provided under Article 2 Paragraph 13 (b) of the Armistice Agreement:

Within ten (10) days after this Armistice Agreement becomes effective, withdraw all of their military forces, supplies, and equipment from the rear and the coastal islands and waters of Korea on the other side. If such military forces are not withdrawn within the stated time limit, and there is no mutually agreed and valid reason for the delay, the other side shall have the right to take any action which it deems necessary for the maintenance of security and order. The term 'coastal islands' as used above, refers to those islands which, though occupied by one side at the time when this Armistice Agreement becomes effective, were controlled by the other side

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10 General Assembly Resolution 195 (III) of December 12, 1948. The problem of the independence of Korea. 2. there has been established a lawful government (the Government of the Republic of Korea) having effective control and jurisdiction over that part of Korea where the people of all Korea reside."
12 Initially, the UN tried to hold negotiations on a cease-fire, but China refused. Then, the negotiations were left to the UNC. The UNC itself referred to approval through the UN (General Assembly resolution). Higgins, United Nations Peacekeeping, pp. 181-184, 281-282.
on 24 June 1950; provided, however, that all the islands lying to the north and west of the provincial boundary line between Hwanghae-do and Kyunggi-do shall be under the military control of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, except the island groups of Paengyong-do (37°58' N, 124°40' E), Taechong-do (37°50' N, 124°42' E), Sochong-do (37°46' N, 124°46' E), Yonpyong-do (37°38' N, 125°40' E), and U-do (37°36' N, 125°58' E), which shall remain under the military control of the Commander-in-Chief, United Nations Command. All the islands on the west coast of Korea lying south of the above-mentioned boundary line shall remain under the military control of the Commander-in-Chief, United Nations Command.\(^\text{13}\)

As shown in the provision, the Armistice Agreement was completely silent on the right to control neighboring waters and sea borders of the parties concerned. The paragraph 15 stipulates that "...all opposing naval forces... shall respect the waters contiguous to the Demilitarized Zones and to the land area of Korea under the military control of the opposing side, and shall not engage in blockade of any kind of Korea." However, the breadth of the waters to be respected is not determined due to the disagreement between them. The United Nations Command strongly proposed 3-mile waters, while North Korea and China demanded 12 miles. In the end, as North Korea demanded that reference to sea boundaries be removed in finalizing the Armistice Agreement, the draft provision on sea boundaries was omitted. This failure to include the provision on the demarcation of waters of jurisdiction in the Agreement has led North Korea to insist that the waters around the five West Sea Islands be its own territorial waters.

B. Validity of NLL — Power of the UNC

According to the explanation of the South Korean Defense Ministry, General Clark, Commander-in-Chief of the United Nations Command established a sea military boundary on August 30, 1953, for the purpose of preventing armed conflicts between North and South Koreas in the neighboring waters of the Korean Peninsula and showing the range of patrolling activities by the armed forces on the sea.\(^\text{14}\) This is what the NLL is about. The United Nations Command approved of the 3-mile waters along the North Korean coast in the Yellow Sea waters, and classified all the other waters as international waters. The establishment of the NLL by the United Nations Command has not been conveyed to North

\(^{13}\) Kamiya, Postwar Materials on Korean Issue, Vol. 1, Material 151, p. 508.

\(^{14}\) MND, The ROK Position Regarding the NLL, p. 5. Besides, "the records of the United Nations Command" explained that "the line was designated in 1958 by the United Nations Command with a view to protecting South Korean fishing vessels." James M. Lee (Former International Relations Advisor of UNCMAC), "History of Korea's MDL & Reduction of Tension along the DMZ and West Sea through Confidence Building Measures between North and South Korea," The Korean DMZ: Reverting beyond Division (Sowha Publishing Co., 2001), p. 88.
Korea through official documents.

The South Korean Defense Ministry considers the NLL establishment as lawful on the ground that it has "facilitated the implementation of the Article 2 Paragraph 13 of the Armistice Agreement," even if the agreement has no provision on the NLL. About 15,000 South Koreans live on the five West Sea Islands, and the United Nations Command "is obliged to support the citizens in these islands" who go back and forth between the islands and the mainland. Like the Korean Peninsula, these islands are the "land area of Korea" and the waters around the islands should be respected as the "waters contiguous to... the land area of Korea" (Agreement, Paragraph 15) like the waters along the coast of the Korean Peninsula. This is the argument of the United Nations Command. The NLL does not necessarily have to be stipulated in the Armistice Agreement under this logic. In accordance with the paragraph 15 and 13 (b) of the Agreement, the waters around the NLL is regarded by North Korea as the waters controlled by the United Nations Command under the South Korean jurisdiction.

The establishment of the NLL is not directly based on the Armistice Agreement. The United Nations Command unilaterally set up the NLL without consultations with North Korea. With this in mind, North Korea has termed the NLL illegal and invalid since the 1970s, and has made peculiar arguments on the range of their coastal waters.

II  Outbreak of Confrontation over Sea Boundaries

A. Approach through the Armistice Agreement

Could the Armistice framework on the Korean Peninsula address the conflicting views of the parties concerned? It is doubtful whether the UN, which has been continuously involved in the Korean Peninsula through the United Nations Command since the Korean War, has played some role in solving the problems over the interpretation of the Armistice Agreement between the parties concerned in order to maintain the cease-fire and prevent...
another war from breaking out. It is also questionable how the fact that such problems have not yet been worked out can be explained within the framework of the armistice maintained under the involvement of the UN.

It is true that the UN has always been involved in one of the two Koreas concerned on the Korean Peninsula during the Korean War and the armistice, in contrast to the PKO which observes a cease-fire as a neutral third party. This contrast should not be a fundamental difference to ensure an effective cease-fire. In any form of involvement, if proper steps are taken to guarantee a long-lasting cease-fire, problems over the implementation of a cease-fire between the parties concerned should be able to be solved successfully. Since such procedures were available under the Armistice Agreement on the Korean Peninsula, a focal point here for study is how the procedures functioned.

The procedures mean specifically the Military Armistice Commission (MAC). The MAC was set up to "supervise the implementation of this Armistice Agreement and to settle through negotiating any violations of this Armistice Agreement" (Paragraph 24 of the Agreement). It consisted of five high-ranking officers appointed by the United Nations Command and another five jointly appointed by the Supreme Commander of the Korean Peoples Army and the Commander of the Chinese People's Volunteers (Paragraph 20). In the 346th plenary session of the MAC held on December 1, 1973, the members discussed on the Yellow Sea for the first time. The issue was put on the agenda repeatedly until the MAC went into indefinite recess in 1991. Recorded in the minutes were only the views expressed by each side and the criticisms against the other.

For example, at the above-mentioned 346th meeting, the United Nations Command said that North Korean patrol boats violated the waters adjacent to the five islands six times between November 19 and December 1, 1973, and violated the paragraph 15 of the Agreement. On the other hand, North Korea asserted that there was no violation of the agreement with the following remarks: "Five islands in the West Sea lie to the north and west of the boundary line of Hwanghae-do Province and Gyeonggi-do Province. Therefore, the waters north of the boundary line of the Hwanghae-do Province and Gyeonggi-do Province belong to our coastal waters," "your side only exercises control over them (five islands)," "... all the waters involving the waters off the five islands in the West Sea are the coastal waters of our side." North Korea also stated that it were U. S. and South Korea

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21 Under the Armistice Agreement, it was planned to hold a political conference (paragraph 60) within three months after the signature of the Agreement. As the plan failed, this paper focuses on the management of MAC.

22 Strictly speaking, in addition to the MAC, the "Neutral Nations Supervisory Commission" was set up under the Agreement. The commission was designed to "carry out the function of supervision, observation, inspection and investigation as stipulated in sub paragraph 13 (c) and (d), and paragraph 28 here of, and to report the results of such supervision, observation, inspection and investigation to the Military Armistice Commission" (the paragraph 41 of the Agreement). In connection with the Korean situation, the UN established the "UN Commission for the Unification and Rehabilitation of Korea" (UNCURK, until 1974) and the "UN Korean Reconstruction Agency" (UNKRA, until 1962).

23 MND, The ROK Position Regarding the NLL, p. 6.

which were engaged in hostile provocative acts and espionage activities and committed a grave violation of the agreement and that any vessel going back and forth from the five islands must get approval and agreement in advance from North Korea.\textsuperscript{25}

The United Nations Command never consented to this lopsided interpretation, but North Korea showed no sign of compromise, saying "no paragraph of the Armistice Agreement provides that any part of the waters in the West Sea is the waters of your side."\textsuperscript{26} The conference produced no fruitful results, only bringing into focus conflicts over the interpretation of the Agreement.

B. Hardening of North Korea's Stance

North Korea reiterated its position at the subsequent MAC meetings, but in 1977, announced the statement that the equidistant median line will be established on the West Sea between North and South Korea as an economic line and a military demarcation line.

On June 21, 1977, North Korea promulgated the decree on economic activities of foreigners, foreign vessels and foreign planes in the 200-mile economic sea zone of the Democratic People's Republic of Korea.\textsuperscript{27} North Korea stated that it will exercise its absolute rights for living resources and non-living resources in the sea, at or beneath the seabed with a view to conservation, management and exploitation of marine resources.\textsuperscript{28} Foreigners and foreign vessels cannot conduct fishing activities in the zone concerned without obtaining prior approval from the North Korean authorities, and they must comply with various rules. The line is an equidistant median line from the boundary between the Hwanghae-do and Gyeonggi-do to the territorial sea boundary between the Korean Peninsula and China. What the Supreme Commander of the Korean Peoples Army

\textsuperscript{23} Ibid., p. 22.
\textsuperscript{24} Ibid., p. 17.
\textsuperscript{28} North Korea is not a signatory to the Conventions on the territorial sea, high seas and continental shelf and the United Nations Convention on the Law of the Sea. Given the customary law nature of the territorial waters and the exclusive economic zone (EEZ), it is possible for North Korea to claim 12-mile territorial waters. The right to exercise over the economic zone outside the 12-mile waters, however, cannot be accepted. In the EEZ, a coastal nation possesses only sovereign rights for exploring, exploiting, conserving and managing the natural resources, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone (Article 56 of UNCLOS). The EEZ is the waters where the jurisdiction of a coastal state is approved only for the functional goals of preservation and use of natural resources and environmental conservation. Considering the two declarations in 1977 regarding the economic zone and the military boundary, it is clear that the initial goal of North Korea was aimed not at the EEZ but the military waters. It did not make sense at all to take up the concept of the economic zone under the law of the sea for that purpose. What's more, an attempt to exercise inclusive authority for the economic zone was considered an abuse of rights.
proclaimed as a maritime military boundary on August 1 the same year is the very economic zone line. The following day, the United Nations Command conveyed to North Korea its view that such a unilateral claim could not be accepted under the Armistice Agreement.

With North Korea’s unilateral designation of a boundary, confrontation over sea boundaries on the Yellow Sea came to the fore between the south and north. At the same time, concerns were mounting for a possible head-on conflict in the waters between the above-mentioned boundary set by North Korea and the NLL, particularly in the waters neighboring the five islands. There was a possibility that North and South Korea would interfere with each other on the Yellow Sea, as they said they would take enforcement action in the process of securing the right to control the waters.

It is known, however, that South Korea had taken practical measures so that their vessels would not encounter in the NLL neighboring waters in light of the peculiar circumstances regarding North Korea. In 1972, the Ministry of Home Affairs of South Korea enforced the Regulation for the Safety of Shipping Operations against repeated capturing of South Korean fishing boats by North Korea. The regulation was designed to designate "special waters" in the sea south of the NLL and ban in principle navigation within the disputed waters unless approval was obtained beforehand and mechanical equipment and materials were fully on board for communication. As the special waters were established in order to prevent North Korean operatives from invading South Korea, they were called "safe waters." However, the establishment of the special waters did not completely remove a possibility of vessels of the two encountering on the Yellow Sea. It is desirable that this confrontation be solved within the Armistice framework where negotiations are held constantly.

Has the Armistice framework worked effectively against the unilateral claims of North Korea since the confrontation came to the fore? Regrettably, the answer is in the negative. For the past three decades, both sides reiterated their respective incompatible arguments at the meetings of the MAC and those of its succeeding organization. Negotiations got nowhere with no meaningful discussions. The number of violations of the NLL remained in the three-digit figure annually in the 1970s, decreasing to the two-digit in the 1990s. In contrast to the thorough examinations of invasions into DMZ by Joint Observer Teams (Paragraph 27 of the Agreement), no other measures prescribed in the Agreement were used for the NLL at all. What's worse, even the MAC cannot fulfill its original functions in the face of North Korea's uncooperative stance. The MAC has not held a meeting since its 459th meeting took place in February 1991. On April 28, 1994, the North Korean

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29 The Ministry of Home Affairs, Republic of Korea, "Regulation for the Safety of Shipping Operations," Regulation of the Ministry of Home Affairs, No. 109, April 17, 1792.
30 The statistics for the invasions of South Korea (including land and sea), the violations of the NLL and the casualties were quoted from the following: Narushige Michishita, "Calculated Adventurism: North Korea's Military-Diplomatic Campaigns, 1966-2000," dissertation submitted to the Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, May 2002, esp. Appendix. The number of the violations of the NLL is the largest — 71 cases — in 1999 when the issue was reported to the UN by the United Nations Command. The number is only an exceptional six in 1997. In any case, the numbers are made available only by South Korea. The actual number may exceed the above-mentioned statistics.
delegation expressed its intent not to take part in any activity of the MAC, throwing the MAC into malfunction. Against the pressure from North Korea, China decided in September the same year not to participate in the MAC hereafter. In the late 1990s, North Korea proposed to the U. S. that it negotiate with the U. S. not the UNC, and that another forum be set up for negotiations instead of the MAC. The proposal was considered to nullify the Armistice framework on the Korean Peninsula.

C. Shift from Armistice Framework to Bilateral Dialogue

North Korea has consistently denied South Korea the position of the real party to the Armistice Agreement. But the South-North Basic Agreement (official name: Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between South Korea and North Korea) is the result of negotiations on both sides concerning areas for jurisdiction. However, this agreement only stipulates that the South-North demarcation line and the areas for non-aggression will be identical with the Military Demarcation Line provided in the Military Armistice Agreement of July 27, 1953, and the areas that each side has exercised jurisdiction over until the present time, not providing a solution to the sea boundary on the Yellow Sea. Though the sea boundary for non-aggression is subject to future consultations under the attached Protocol, Article 10, the Joint Military Commission (Article 12) set up under the Basic Agreement has failed to reach accord.

The General Officer Talks (GOT) has taken the place of the MAC as a forum for negotiations between the United Nations Command and North Korea. On the agenda between June and September 1999 were NLL violations committed by North Korea a while before and its subsequent gunfighting with South Korean patrol vessels. The discussions were no different from those at the MAC.31

Outlined so far have been the views of the parties to the Armistice Agreement in terms of effectiveness of the armistice framework for the sea boundary on the Yellow Sea. Approaches to the boundary issue have not worked well from the time to the present moment in spite of repeated invasions of the NLL. First, the Armistice Agreement has no provision on sea boundary lines, which is a main cause of conflicts. Second, procedures for the Armistice have not functioned effectively, as shown by the MAC meeting. The United Nations Command found it difficult to make reference to "violations" of the NLL compared with easier-to-handle DML. Essentially, however, North Korea's views on the Agreement exert great influence. According to North Korea, South Korea is not a party to the Armistice

31 The minutes of each GOT meeting held in 1999 — 6th (June 15), 7th (June 22), 8th (July 2), 9th (September 21), 10th (August 17) and 11th (September 1). Documents of General Officers Talks provided by the UNC.
Agreement. The MAC with South Korean generals taking part as members is structurally defective. The presence of the United Nations Command on the Korean Peninsula is in reality the U.S. itself. Therefore, it is not the United Nations Command but the U.S. that is a party to negotiations to formally establish peace in the true sense of the word on the Korean Peninsula. The fact that the MAC had initial difficulty fulfilling its functions has led to the deadlock of negotiations within the MAC and to an indefinite recess in the 1990s. The third reason, related to the second, is that an appropriate forum for negotiations on the sea boundary line has not necessarily been decided, though the MAC was driven into malfunction. It was already pointed out that the discussions within the GOT, a successor to the MAC, has not gotten nowhere. There are some fluctuations on issues within the GOT. As regards the sea boundary, the United Nations Command insisted that the Joint Military Commission based on the Basic Agreement be a correct forum for negotiations, leaving a solution to bilateral dialogue between North and South Korea. The United Nations Command insisted that it be a party to the Agreement and that the framework of the Armistice remains effective. At the same time it denied its involvement in the sea boundary issue, which would help maintain a cease-fire. As a result, the nature of the conflicts has deviated from the initial objective of ensuring the armistice. This points to a possibility of shifting to the bilateral framework of North and South Korea as a forum for negotiations.

III Leaning toward the Law of the Sea

In addition to the above-mentioned lack of organized approaches, another factor has given influence to the issue of sea boundaries — different aspirations for political positions between North and South Korea. The confrontation on the Korean Peninsula has shifted from a struggle for power within a single state to an almost complete conformation between the two states. In contrast to South Korea, which gives priority to the participation in the UN over unification, North Korea long clungs to a single state system. Given the simultaneous joining in the UN, participation in multinational treaties and the recognition by third countries, the "special relations" between the two (in the preamble of the North-South Basic Agreement) are equivalent to state-to-state relations. As the two have acquired statehood, the boundary on the Yellow Sea will change in tones. A military demarcation within a single state is only a temporary boundary line among several factions, whereas an official boundary of jurisdictional limit will become increasingly important where a friction

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occurs between the two states.

Moreover, there is no denying that the political structure has had no small impact. As the armistice system has certainly been established on the Korean Peninsula, it was not necessarily assumed to ensure an absolute one under the supervision of the UN. In as early as 1953, South Korea concluded a Mutual Defense Treaty with the U. S., while North Korea signed a Mutual Assistance Treaty with the Soviet Union and China in 1961. Thus, the two Koreas sought ways of joint actions in the event of a military invasion into one from the other, aside from the Armistice framework. If each resorts to external measures other than the procedures of the Armistice Agreement when an invasion equivalent to a violation of the Agreement takes place, the probability of "ensuring a cease-fire" will be reduced, and the problem over the implementation of the Agreement will be redefined as an item below joint defense measures at a time of an aggression. If approaches to a military boundary line between North and South Korea are considered as part of the worst scenario of a military invasion by the other, they will be recognized as a serious threat. If they are regarded as sporadic incursions, they will be handled on a case-by-case basis. Differences in tackling the boundary issue between on land and at sea result not only from whether such a provision is included in the Armistice Agreement but from less possibility of a war being resumed at sea. For this reason, it was not considered necessary to deal with the issue over a sea boundary actively in the armistice procedures. In any case, given an ever decreasing possibility of an invasion by the other and an all-out war on the Korean Peninsula, it is greatly possible that North Korea has repeatedly crossed the NLL and invaded into the South Korean waters with a view to ensuring and expanding its own jurisdiction (with a potential of a unilateral invasion).

A. Discussions on NLL within South Korea

South Korea takes the view of comparing disputes over a sea boundary line on the Yellow Sea to conventional sea boundary disputes between states on the premise that each nation is gaining the qualifications as a state. Such a view demonstrated in representative example is the opinion of the South Korean Defense Ministry that the pending waters on the Yellow Sea are taken as "territorial jurisdiction," replacing "war zone" during the Korean War.

In its document on the NLL in 2002, the South Korean Defense Ministry stated that "the current NLL, which approximately connects the median points between Hwanghae

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34 Under the cease-fire framework agreement in Iraq, it was determined that the UNIKOM would be sent to demilitarized zones to monitor the DMZ and deter violations of the boundary through its presence and surveillance of the zone and observe any hostile or potentially hostile action mounted from the territory of one State against the other, and furthermore, take physical action to prevent violation. The UN Secretary-General would regularly report on the UNICOM operations, and immediately on serious violations in the zones and potential threats to peace to the Security Council (Security Council Resolution 687 of April 4, 1991 and Resolution 687 of April 9, 1991), but similar procedures are not available on the Korean Peninsula.
province's coastline and the five islands, is a line which reflects the principles of the international law” (article 15 of United Nations Convention on Law of the Sea). In the 1999 White Paper on Defense, the ministry expressed its view that the NLL is equivalent to the sea boundary between North and South Korea on the grounds that South Korea has exercised sovereignty over the NLL based on the Armistice Agreement for 46 years, and that the tacit approval of the NLL on the North Korean side represents "historical titles and other special circumstances" prescribed in the same article, whether the equidistant median line principle or special circumstances are applied. Cited as evidence for the implicit recognition by North Korea were: (1) that the NLL was described in the 1959 document published by North Korea; (2) when North Korean vessels were suspected of espionage activities in 1963, North Korea explained that the vessels were in the waters north of the NLL; and (3) supplies were delivered to North Korea around the NLL when North Korean Red Cross transported relief items to flood victims of South Korea in 1984. Also quoted were the contents of the North Korean proposal for the draft North-South Basic Agreement and the fact that North Korea did not make any objections until 1998 regarding the reference to the NLL in "Flight Information Region (FIR)" published by ICAO.

However, many criticisms have been leveled against this view of the Defense Ministry. For example, Professor Kim says that the equidistant median line principle cannot be applied since North and South Korea are not in conventional state-to-state relations, terming the quotation of the Law of the Sea wide off the mark. The bilateral relations lack the premise for the application of the Law of the Sea before specific methods and their conclusions are discussed for their illegality. The NLL is appropriate for North and South Korea, as it takes on an aspect of implementation of the Agreement, and at the same time represents a fait accompli. The latter is different from the view of the United Nations Command, which bases its position on the Armistice Agreement but does not necessarily stress legal validity of the NLL. Other South Korean organizations, such as the Joint Chiefs of Staff, only refer to "sea areas," regarding the use of the term "territorial waters" inappropriate. Views thus, vary on the basis for appropriateness of the NLL.

B. Unilateral Demarcation by North Korea

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37 MND, Defense White Paper 1999, p. 81. The testimony of Defense Secretary Cho Seong Tae at a Defense Committee meeting that "the waters south of the NLL are South Korea's territorial waters" has the same effect. National Defense Committee, The 204th Extraordinary Session of the National Assembly, June 10, 1999. Reference and translation in Michishita, "Calculated Adventurism."
38 Arms Control Bureau, MND, Republic of Korea, The Unjustness of North Korea Claim on the West Sea, September 1999.
39 MND, The ROK Position Regarding the NLL, p. 10.
40 Ibid., p. 11.
41 MND, The Unjustness of NK Claim. The NLL is not directly referred to in the provision, as North Korea asserts. Therefore, "approval" of North Korea cannot be deduced from this.
42 MND, The ROK Position Regarding the NLL, p. 12.
Following the 1977 proclamation, North Korea declared the demarcation of the sea military boundary in 1999, and unilaterally classified the five islands into three zones and set up one-mile waterways reaching the first and second zone from the sea military boundary in February 2000. North Korea based the demarcation on the view that the five islands are in its own waters north of the military boundary and that the islands, which belong to the South, do not have any contiguous territorial waters. It stated that the two waterways linking the sea military boundary and the five islands are the only waters for South Korean vessels to navigate the islands. Furthermore, the two waterways are not recognized as South Korea's jurisdictional waters. North Korea only allows South Korea to use them for going back and forth between South Korea and the islands. The waterways are under jurisdiction of North Korea.

It is impossible to rely on historical rights and justify the above-mentioned North Korean claim that the five West Sea Islands belong to South Korea but have no jurisdictional waters surrounding them. Historically, the five West Sea Islands were occupied by the U.S. forces from the end of World War II to the outbreak of the Korean War, and have been occupied either by the U.S. or by South Korea since the end of the Korean War. Even North Korea makes no objection to this point. During the Korean War, part of the five West Sea Islands were occupied temporarily by North Korea. It is known, however, that a defense measures have been laid consistently for the islands, together with the Armistice Agreement, in view of their military significance recognized by the U.S. forces. On the ground that an entity possessing land controls neighboring waters, it is a natural conclusion that the waters adjoining the five islands belong to South Korea. It is true that the Armistice Agreement makes no reference to jurisdiction over the waters neighboring the five West Sea Islands, but as the adjacent waters belong to South Korea under the above-mentioned principle, North Korea needs to cite evidence to overrule this conclusion.

As studied so far, a recent notable tendency in both North and South Korea is discussions regarding a sea boundary line on the Yellow Sea in connection with the law of the sea. Lying behind this is a strategy for negotiations to give a certain amount of persuasiveness to each claim and a peculiar perception of the "cease-fire" where the South and the North are in durable peace under semi-state-to-state relations, which is different

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45 T In addition to the afore-mentioned view of the South Korean Defense Ministry (MND, *The ROK Position Regarding the NLL*), the comment by Lee on the military boundary of North Korea is the case in point. Lee's comment that the demarcation of the military boundary by North Korea far exceeds the power under the law of the sea in that the boundary approves of military rights of a coastal nation in the economic zone does not deny application of the law of the sea. This view is based on the premise that the North Korean government ordinance establishing the military boundary is equivalent to recognizing the Korean Peninsula as being in time of war and thus violates the fundamental principle of the Armistice Agreement banning all the hostilities. Lee, "North Korea's Law of the Sea Policy," p. 155.
from the situation at the end of the Korean War or during the Cold War.\textsuperscript{45} The trend also implies an advanced claim over jurisdiction with future conflicts over demarcation in mind, or an act to prevent each claim from becoming crystallization.

For example, South Korea enacts a domestic law designed to carry out marine scientific research in the "jurisdictional waters" south of the NLL (Marine Scientific Research Law, Article 2 paragraph 4), and allows foreign (practically American) companies to join the research on condition of approval from the South Korean government.\textsuperscript{46} This is understood as premised that South Korea can have jurisdiction over the waters with the NLL as the northern limit under the law of the sea, not as the mere cease-fire zones. If so, North Korea naturally resorts to actions to prevent this. This clearly reflects the situation where rights under the law of the sea, which should originally be limited to relations with a third country, cover even the pending waters. Considering these differences, it is easy to understand that views on the alleged boundaries on the Yellow Sea, including the NLL, or the pending waters, vary depending on the scholars.

C. Legal Standard for Boundary Demarcation on the Yellow Sea

1. Possibility of Applying the Law of the Sea to Relations between North and South Korea

The claims based on the law of the sea are not always appropriate in the present situation of the Korean Peninsula under the Armistice. Even a boundary on land, let alone a boundary at sea, has not yet been determined. However, discussions raised by two sides include some factors to be inherited to future negotiations on boundary demarcation. Actually, disputes on the Yellow Sea are arising with a third country, leaving great room for influence by North and South Korean stances.\textsuperscript{47} Here, brief explanations will be given to points to be raised on the assumption that disputes over boundary demarcation will take place on the Yellow Sea in future.

In case a boundary is established on the Yellow Sea under the law of the sea, territorial waters will depend on the delimitation principle under the law of the sea as quoted by South Korea. Article 15 stipulates: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however,

\begin{itemize}
\item \textsuperscript{47} South Korea and China established the diplomatic relations in 1992, some 40 years after the cease-fire on the Korean Peninsula. Serious problems between two sides are boundary demarcation on the Yellow Sea and allocation of resources. As a tentative measure until official negotiations on boundary demarcation take place, two sides signed a fisheries agreement on August 3, 2000, assuring bilateral cooperation in protection of fishing resources. Ministry of Foreign Affairs HP of People's Republic of China, "III China's Maritime Demarcation and Bilateral Fishery Affairs (2001/07/09)," at <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2628/t15476.htm> access on February 24, 2004.
\end{itemize}
where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith. South Korea is for the phrase "opposite to each other," while North Korea is for "adjacent to each other." In any case, it is only "special circumstances" over the five West Sea Islands that play an important role in adopting respective positions.

a) Equidistant Median Line between the Five West Sea Islands and North Korean coastal areas

The NLL, as asserted by South Korea, particularly the Defense Ministry, is after all a method for drawing an equidistant median line between the five West Sea Islands and northern coastal areas by regarding the islands and the coastal areas as opposite to each other. Considering an actual geographical configuration, Paengnyong Island is 47 miles away from Changun Island, making it virtually impossible to set a uniform territorial water line as advocated by the Defense Ministry. Even on the assumption of boundary demarcation between the South and the North facing each other, it is necessary to establish an economic zone (or an adjoining sea area) for waters available for a territorial water line in a separate provision. Simple and mechanical boundary demarcation of territorial waters with an equidistant median line as claimed by the South Korean Defense Ministry cannot solve the issue.\[48\]

b) Equidistant Median Line with Attention Given Only to Coastal Areas of the Korean Peninsula

In contrast, North Korea asserts boundary demarcation between states adjacent to each other. It is true that North and South Korea adjoin each other with the MDL as a major boundary line on land. The five West Sea Islands are far from the South Korean mainland, and open seas remain among the islands. In this context, North Korea states that attention should be paid to coastal areas, not the islands, in establishing a boundary. In this case, a vertical equidistant median line is set along coastal areas of the peninsula. It is groundless for North Korea to claim that the five islands have no adjacent territorial waters on the basis of historic titles, and therefore cannot be supported. The problem in connection with special circumstances of South Korea is whether a vertical line along coastal areas is appropriate as long as territorial waters are approved for the five West Sea Islands.

\[48\] This method for delimitation is also introduced to South Korea as a Yellow Sea boundary demarcation map prepared by the U. S. State Department. Kim Young Koo, *South Korea and International Law of the Sea* (South Korean Institute for Marine Strategies, 1999), p. 461, materials 7-12.
2. Various "Special Circumstances" in Demarcation on the Yellow Sea

Regarding the "islands," discussions have been carried on to work out "special circumstances." For example, half the titles are given to an island which belongs to a coastal State and is adjacent to its mainland.\(^{49}\) However, in case islands are situated far away from its mainland to which they belong and are rather close to coastal areas of another State as exemplified in the five islands, there is no consistent approach. For example, a boundary is established for islands independently and territorial waters belong to another country. Regarding the five West Sea Islands, some are close to each other, making it possible to set up a single territorial line to some extent. Depending on special circumstances, treatment of territorial waters as adjacent to coastal areas may work to disadvantage of South Korea. If more emphasis is placed on "special circumstances" regarding the NLL as a practical boundary line for the past decades, the above-mentioned approach will not likely be adopted.

This chapter has explored possibilities of approaches to boundary demarcation under the law of the sea which have been presented by national organizations of North and South Korea, and the United Nations Command. Methods for applying the equidistant median line principle differ depending on how special circumstances are considered regarding the five West Sea Islands. It is difficult to draw a single boundary between the five islands and coastal areas of North Korea, and also difficult to use the NLL as boundary line under the law of the sea. Even if the NLL is viewed as special circumstances, it will give influence to actual work for demarcation how the NLL will be evaluated in terms of its nature and historical titles as a cease-fire line. However, to give consideration to special factors as an armistice line within the framework of the law of the sea is outside the original assumptions of the law of the sea. Is it possible to regard North Korea's nonperformance of 20 years until it made an official protest as "tacit approval?" Is it appropriate to say that the NLL has worked as an effective line so far, in view of repeated protests North Korea made at the MAC and a series of acts (invasions of the South Korean waters crossing the NLL)? When we consider these questions, a certain view can be established on the cease-fire, which has lasted some 50 years on the Korean Peninsula. If mechanical demarcation is conducted regardless of historical backgrounds between the South and the North and the above-mentioned factors, it will produce unreasonable results. After all, even after the two Koreas

overcome "special circumstances," it will still remain difficult to be unconcerned with the situation during the cease-fire.

Conclusion

In this paper, I tried to deal with points at issue regarding a sea boundary line on the Yellow Sea with confrontation over the NLL between North and South Korea as a central factor. The controversy stemmed from the fact that the Armistice Agreement has no provision regarding a sea boundary, but a more essential problem is that all-out efforts have not been made to solve the issues under the framework of the Armistice. One of the reasons is that the importance was not attached to points of contention for which such action was not considered necessary. During the Korean War, as the Allied Forces maintained an overwhelming advantage in the waters around the Korean Peninsula, the NLL was regarded as only South Korea's northern limit of patrol areas. A pure cease-fire line was considered necessary mostly on land, not at sea, with a view to separating the forces of the two standing face to face with each other. Apart from the framework of the Armistice, threats from North Korea and its friendly Communist allies were felt mostly on land. In this respect, if the NLL was not strongly expected to play a role as a cease-fire line both in a practical sense and under the Armistice Agreement, the fact that a solution is not at hand is not a problem.

What is very peculiar about the NLL or its Northern counterpart, is that a boundary on the Yellow Sea is not considered a dispute over a cease-fire line pure and simple, though it is an issue between the South and the North in the Armistice. They have tried to invoke the provisions of UNCLOS, not only because it can reinforce their arguments but also because they want to possess even a little more waters under respective jurisdiction presupposing that the current MDL will likely be established as a border. If the significance of setting a boundary on the Yellow Sea changes at least for the parties concerned as time goes by, arguments on a boundary to be established on the Yellow Sea, including the conclusion as to whether the NLL is valid or not, cannot help varying depending on various relevant factors, such as relationship between North and South Korea and the overall political situation on the Peninsula. What is fatal is that potential conflicts at sea assumed in this paper will not necessarily take place as they are. If North and South Korea is unified as a result of North Korea's collapses or for other reasons, it may not be required to establish a boundary line within a single state. If the current situation continues for a long time, there

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is no prospect of the conflicts settled in the near future. Admitting that the situation on the Korean Peninsula still remains fluid, it is significant to some extent to study closely the confrontation expected to last for some time and to understand the underlying structure of the bilateral conflicts. Of course, it should be noted that an outcome of the confrontation relies heavily on future political settlement the two will reach on the Korean Peninsula.